

16-90105-jm  
December 22, 2016  
Chief Judge

**JUDICIAL COUNCIL OF THE  
SECOND CIRCUIT**

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In re  
CHARGE OF JUDICIAL MISCONDUCT

Docket No. 16-90105-jm

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ROBERT A. KATZMANN, *Chief Judge*:

On November 3, 2016, the Complainant filed a complaint with the Clerk's Office of the United States Court of Appeals for the Second Circuit pursuant to the Judicial Conduct and Disability Act of 1980, 28 U.S.C. §§ 351-364 (the "Act"), and the Rules for Judicial-Conduct and Judicial-Disability Proceedings, 249 F.R.D. 662 (U.S. Jud. Conf. 2008) (the "Rules"), charging a district judge of this Circuit (the "Judge") with misconduct.

**BACKGROUND**

The Complainant filed a pro se employment discrimination action that was assigned to the Judge. The Judge referred the case to a magistrate judge for pretrial matters and for any dispositive motions requiring a report and recommendation. The defendant's motion to dismiss and the Complainant's

opposition have been pending since April 2016. The docket does not reflect any motions or letters requesting a ruling.

The misconduct complaint alleges that the Judge has “deliberately refused” to rule despite the Complainant’s letters requesting a ruling and his visits to chambers and the pro se office. The misconduct complaint also alleges that the Complainant, following a visit to the pro se office, was confronted outside the courthouse by men “who identified themselves as marshals of the Court.” The men allegedly told the Complainant that he had violated “an ordinance” by visiting chambers, but would not provide any legal authority for that position. The misconduct complaint alleges that the men confronted the Complainant “at the behest and insistence” of the Judge. The misconduct complaint asks for an investigation into the delay in proceedings and to compel action by the Judge or for other equitable relief.

## **DISCUSSION**

The complaint is dismissed.

The motion to dismiss is pending before a magistrate judge, not the Judge, so the allegation of delay is leveled against the wrong judge. Nevertheless, the allegation is dismissed as merits related — i.e., as “directly related to the merits of

a decision or procedural ruling.”. See 28 U.S.C. § 352(b)(1)(A)(ii); Rule 3(h)(3)(B) (excluding from cognizable misconduct “an allegation about delay in rendering a decision or ruling, unless the allegation concerns an improper motive in delaying a particular decision or habitual delay in a significant number of unrelated cases”); Rule 3 cmt. (“[A] complaint of delay in a single case is excluded as merits-related. Such an allegation may be said to challenge the correctness of an official action of the judge—in other words, assigning a low priority to deciding the particular case.”). Purely merits-related allegations are excluded from the Act to “preserve[] the independence of judges in the exercise of judicial power by ensuring that the complaint procedure is not used to collaterally attack the substance of a judge’s ruling.” Rule 3 cmt. Such challenges can be pursued, to the extent the law allows, only through normal appellate procedures.

The complaint also alleges that the Judge instructed the Marshals Service to confront the Complainant. Assuming the confrontation occurred, the allegation that the Judge directed the confrontation is speculative and wholly unsupported, and is therefore dismissed as “lacking sufficient evidence to raise an inference that misconduct has occurred.” 28 U.S.C. § 352(b)(1)(A)(iii); Rule 11(c)(1)(D) ; *see In re Memorandum of Decision of Judicial Conference Committee on Judicial Conduct and*

*Disability*, 591 F.3d 638, 646 (U.S. Jud. Conf. Oct. 26, 2009) (“Rule 6(b) makes clear that the complaint must be more than a suggestion to a Chief Judge that, if he opens an investigation and the investigating body looks hard enough in a particular direction, he might uncover misconduct. It must contain a specific allegation of misconduct supported by sufficient factual detail to render the allegation credible.”).

Moreover, judges (and court staff) are encouraged to refer any security-related concerns to the Marshals Service, which then conducts an independent assessment and determines what action, if any, needs to be undertaken. The Marshals Service also monitors potential concerns on its own initiative, and takes action when necessary. In both scenarios, judges are often not aware of what actions the Marshals take. It is unclear whether the Judge raised any concern with the Marshals Service at all, but even if the Judge had, that official action will not be second-guessed in a judicial misconduct proceeding, absent a supported allegation of improper motive or purpose. *See* 28 U.S.C. § 352(b)(1)(A)(ii); Rule 3(h)(3)(A) cmt. (“Any allegation that calls into question the correctness of an official action of a judge—without more—is merits related.”). The complaint contains no allegation of an improper motive or purpose.

The Clerk is directed to transmit copies of this order to the Complainant and to the Judge.